MOTION FILED
JUN 26 1981

No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF *AMICUS CURIAE* OF CABLE TELEVISION INFORMATION CENTER

BINGHAM KENNEDY
Counsel of Record

TRILLING & KENNEDY
1100 Seventeenth Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 223-1577

HOWARD J. GAN
General Counsel

Cable Television
Information Center
2100 M Street, N.W.
Washington, D.C. 20037
(202) 872-8888

Counsel for Cable Television Information Center

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Cable Television Information Center ("CTIC") hereby moves the Court for leave to file the attached brief *amicus curiae* in support of the Respondent, pursuant to Rule 36, for the reasons set forth below.

I. Nature Of CTIC's Interest.

The Cable Television Information Center is a not-for-profit organization which was created in 1972 to serve as an objective, national source of information on cable television and to assist local officials in making more informed decisions concerning licensing and regulation of cable systems. During almost nine years of operation,[1] CTIC has provided the public and local com-

[1] From 1972 to 1980, CTIC was part of The Urban Institute in Washington, D.C. In 1980, it became an independent membership organization, obtaining partial support from member cities and the remainder of its funds from publications and technical services to

munities with a variety of services, including: publications and studies on cable television technology, regulation, and economics; a monthly newsletter; seminars and workshops on community uses of cable TV; advisory assistance on franchising methods, evaluation of competing franchise applicants and industry trends. CTIC has no affiliation with any cable television company or equipment manufacturer.

CTIC believes that local governments can effectively deal with the technical and regulatory problems posed by cable TV if they do so on an informed basis. To that end, CTIC has since 1972 provided assistance to more than 2,000 municipalities. Accordingly, it is well qualified to address the role of local governments in cable TV regulation and the likely consequences of a ruling for the petitioner in this case.

CTIC seeks to represent the substantial interests of its 175 member cities, including Boulder, Colorado, in the resolution of the questions before the Court since an adverse holding in this case may effectively preclude them from regulating cable television. CTIC offers the Court its perspective on the need to immunize local government actions in the field of cable TV from antitrust litigation.

The briefs filed by the parties herein are unlikely to address the public policy issues related to cable television technology and regulation, focusing instead on the antitrust questions. CTIC seeks to present an alternative perspective on the implications of this case for local

---

municipalities. In 1981, the membership, publications and general information services of CTIC were separated from the paid technical services which were taken over by CTIC Associates, a for-profit organization.

regulation, taking into account the tremendous potential impact of cable on every community in this country. The dramatic advances in the capabilities of cable TV in recent years have made possible a revolution in local as well as national communications. This communications revolution is not simply in entertainment, but in police and fire protection, education, transportation, health care, community programming and local commerce. Thus, cable TV has the potential to affect the everyday life of virtually every citizen to whom it is made available and it will perform an increasingly important function in providing communications within local communities.

The briefs filed herein are also not expected to contain any discussion of communications policy as it relates to this appeal. Yet, this case did not arise in a regulatory vacuum. Cable television has been subject to regulation by the Federal Communications Commission ("FCC") for more than a decade. In recent years, the FCC has shifted its regulatory approach in terms of federal involvement. However, the FCC has consistently underscored the legitimacy and importance of local government in cable regulation. As evidenced by its mandatory franchising standards, the FCC considered local regulation to be both valid and desirable. And, despite its subsequent shift to "deregulation," the FCC made clear that its purpose was not to free cable TV of all regulatory controls, but rather to give local authorities the flexibility to franchise and regulate based on local public policy considerations. Thus, one purpose of the attached brief is to place the legitimate regulatory role of local government in a federal communications policy perspective.

II. The Relevancy Of The Matters Which CTIC Seeks To Address.

CTIC seeks leave to file its brief principally to discuss: (a) the established pattern of local government regulation of cable TV pursuant to broad delegation of state authority; (b) the nature of the cable TV industry today and the fundamentally local policy issues which must be resolved; and (c) the chaos that is likely to ensue for cities, for the courts and possibly for the cable industry if this Court rules for the petitioner.

The nature of cable television systems today is relevant to this case. Recent developments in cable TV technology have brought about profound changes in the types of services offered which will bring about fundamental changes in communications within the communities served. Cable systems can provide communications services in areas which have traditionally been a primary concern of local government. The underlying issue in this case is whether thousands of municipalities which seek to ensure that high quality cable TV service will be provided to their citizens will be subjected to extended and enormously expensive antitrust litigation if they act without first having received a specific form of authority from the state — even if broad authority to regulate already exists. The nature of cable TV and the interest of the local community are central considerations in resolving that issue.

Many of the regulatory provisions adopted by local governments today arguably have significant anticompetitive effects and may even constitute *per se* violations of the Sherman Act, absent immunity. The Court's resolution of the municipal immunity issue will determine whether local governments are to have any continuing

role in regulating cable television. Under the umbrella of antitrust immunity, local regulation serves to protect the public interest in areas such as safety, technical quality and ensuring nondiscriminatory service throughout the community. To strip municipalities of antitrust immunity may well prevent the proper resolution of these vital local concerns.

III. Conclusion.

CTIC seeks to address several issues specifically related to cable television regulation which have not been adequately addressed by the other briefs filed in this proceeding.

CTIC has sought, and has been denied, the consent of counsel for Community Communications Company, Inc., to file its Brief. For the reasons set forth above, CTIC respectfully requests that the Court grant its leave to file the attached Brief *Amicus Curiae* In Support of Respondent.

Respectfully submitted,

BINGHAM KENNEDY
Counsel of Record

TRILLING & KENNEDY
1100 Seventeenth Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 223-1577

HOWARD J. GAN
General Counsel

Cable Television Information
Center
2100 M Street, N.W.
Washington, D.C. 20037
(202) 872-8888

Counsel for Cable Television
Information Center

TABLE OF CONTENTS

PAGE

MOTION FOR LEAVE TO FILE BRIEF *Amicus Curiae* IN SUPPORT OF RESPONDENT i

TABLE OF AUTHORITIES ix

BRIEF ON THE MERITS:

INTEREST OF THE *Amicus* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The Established Pattern Of Municipal Regulation Of Cable Television Reflects The Local Nature Of The Regulatory Issues Involved 3

A. There is an Established and Widespread Pattern of Local Regulation of Cable Television Under Broad Existing Municipal Authority 3

B. Federal Policy, as Expressed by the Federal Communications Commission, Has Consistently Recognized and Underscored the Fundamental Role of Local Government in Licensing and Regulating Cable Systems ... 5

C. The Regulatory Issues Raised by Cable TV Are Fundamentally Local in Nature 9

II. A Ruling For The Petitioner Would Effectively Eliminate The Established Pattern Of Municipal Regulation Of Cable Television 12

A. The Positions of the Petitioner and the *Amici* States Would Subject Several Thousand Municipalities to Antitrust Scrutiny ... 12

B. Typical Forms of Municipal Cable TV Regulation May Have Anticompetitive Effect, But Serve Legitimate Public Interests. 15

C. A Denial of Broad Municipal Immunity Will, in Practical Terms, Eliminate Municipal Regulation of Cable TV in Thousands of Municipalities 18

Table of Contents Continued

PAGE

CONCLUSION 21

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: PAGE

California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.* 445 U.S. 97 (1980) 14

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 13

Standard Oil Company v. *United States*, 221 U.S. 1 (1911) 19

TCI Cablevision, Inc. v. *Jefferson City*, No. 81 4054 CV C W (W.D.Mo., filed March 18, 1981) 20

Televents, Inc. v. *Martinez*, No. C81-2376 TEH (N.D. Cal., filed June 12, 1981) 20

REGULATIONS:

44 Fed. Reg. 25245 (1979) 9

41 Fed. Reg. 34963 (1976) 17

39 Fed. Reg. 14288 (1974) 7, 8

37 Fed. Reg. 3252 (1972) 5, 6, 7, 11, 17, 18

OTHER AUTHORITIES:

S. Briley, *State Involvement in Cable TV and Other Communications Services: A Current Review*, in THE CABLE/BROADBAND COMMUNICATIONS BOOK, Vol. 2 p. 45 (M.L. Hollowell ed. 1980) 3

Cablefile/81 (Titsch Publishing, 1981) 19

CABLEVISION (June 22, 1981) 11

Federal Communications Commission, Cable Television State Regulation (June, 1981) 3

Paul Kagan Associates, Inc., Cable TV Regulation (March 27, 1981) 16

12 E. MCQUILLIN, MUNICIPAL CORPORATIONS (3d rev. ed. 1970) 4, 5

Table of Authorities Continued

OTHER AUTHORITIES: PAGE

T.A. Muth, *State Cable Legislation,* Cable Communications and the States (New York State Senate, 1975) . 4

R.L. Smith, *The Birth of a Wired Nation,* CHANNELS OF COMMUNICATIONS, p. 32 (April-May, 1981) 10, 12

Television Digest, Cable Addenda to Television Factbook No. 50 (June 1, 1981) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF ON THE MERITS

INTEREST OF THE AMICUS

The nature of CTIC's interest in this litigation is set forth in the foregoing Motion For Leave To File Brief *Amicus Curiae* In Support Of Respondent.

SUMMARY OF THE ARGUMENT

The established framework for regulation of cable television service places principal reliance on local government. Since cable service, by its very nature, makes use of the public streets and rights-of-way, municipalities must approve any proposed system and may impose reasonable conditions on their consent. Moreover, pursuant to its broad police power, local government has the authority to ensure that cable service is provided in a manner that serves the public interest. The Federal Communications Commission has long recognized the legitimate role of municipal government

in regulating cable service as consistent with federal telecommunications policies.

It is appropriate for local government to have a primary regulatory role because cable television presents public policy issues which are fundamentally local in nature, requiring familiarity with conditions in the local community. By the nature of the industry itself, cable service historically has shown a strong tendency toward local monopoly, giving rise to a need to ensure reliable service to the entire community at reasonable rates. In addition, recent technological advances have enabled cable to perform functions which are uniquely local and which have traditionally been the concern of municipal government.

Municipal regulation of cable service is widespread. In the majority of states regulation is undertaken pursuant to grants of governmental authority which do not explicitly articulate a state policy to supplant competition. Many of the most prevalent forms of cable television regulation may be anticompetitive, but serve important needs of the community and the cable industry itself. Absent immunity, thousands of municipalities will be potentially subject to antitrust litigation which, by its nature, is complex, lengthy and expensive. Relatively few municipalities can afford the expense of defending such litigation, regardless of the outcome, much less afford to run the risk of treble damages. If the Tenth Circuit's decision is reversed, local regulation of cable television under existing authority will effectively be eliminated. In addition, numerous municipalities will be subject to suit for actions already taken, producing a flood of litigation in the federal court system.

Elimination of local regulation will leave cable TV largely unregulated. As a result, the important questions of public policy raised by cable service will remain unresolved, to the detriment of the public and, in the long run, the industry itself.

ARGUMENT

I. THE ESTABLISHED PATTERN OF MUNICIPAL REGULATION OF CABLE TELEVISION REFLECTS THE LOCAL NATURE OF THE REGULATORY ISSUES INVOLVED.

A. There Is An Established And Widespread Pattern Of Local Regulation Of Cable Television Under Broad Existing Municipal Authority.

In practice, the licensing and regulation of cable television has been performed by local governments in the vast majority of the states. Currently, there are 4,343 cable TV systems in operation in 10,515 communities throughout the country, most operating under local franchises.[1] This local regulation has taken place with the express approval of the Federal Communications Commission ("FCC") and with the express or tacit approval of the 39 states which have not vested regulatory oversight of cable TV in a state agency. Only 11 states have enacted legislation establishing regulatory programs administered by a state agency.[2]

---

[1] Television Digest, Cable Addenda to Television Factbook No. 50 (June 1, 1981).

[2] Federal Communications Commission, Cable Television State Regulation (June, 1981); S. Briley, *State Involvement in Cable TV and Other Communications Services: A Current Review*, in THE CABLE/BROADBAND COMMUNICATIONS BOOK, Vol. 2, p. 45 (M.L. Hollowell ed. 1980). The statutes are listed in Appendix A.

Only five of these states—Alaska, Connecticut, Hawaii, Rhode Island and Vermont—have fully preempted local franchising

In 15 states, specific statutory authority has been conferred on municipalities to license and regulate cable systems.[3] Such legislation has been enacted primarily to remove any question concerning the authority of municipalities to regulate under either general police powers or the power to impose conditions on use of the public rights-of-way.[4] In the remaining 24 states, municipalities have granted licenses or franchises and have imposed restrictions on cable TV systems under traditional grants of general governmental authority, in the absence of specific state authorization to do so. Therefore, in a total of 39 states there is an established pattern of licensing and regulation of cable television by local government under grants of authority which may well come under antitrust scrutiny if the Court holds for the petitioner.

In order for a cable system to operate in a municipality, it must construct a wired system which uses the public streets and rights-of-way. As a result, local government authorization for cable system construction is essential, absent total state preemption of the field. Municipal corporations possess the power to ensure the health, comfort and welfare of their inhabitants, including the power to promote communication and to facilitate local commerce. 12 E. McQUILLIN, MUNICIPAL

---

authority, placing total regulatory control in the hands of their public utility commissions. In three other states, which place oversight in their state utility commissions—Delaware, Nevada and New Jersey—local municipalities retain the authority to grant cable franchises. Massachusetts, Minnesota and New York have independent state cable agencies but nonetheless leave franchising authority in the hands of local government.

[3] The statutes are listed in Appendix B.

[4] T.A. Muth, *State Cable Legislation,* Cable Communications and the States (New York State Senate, 1975).

CORPORATIONS, §24.33 (3d rev. ed. 1970). It is similarly well established that if the consent of the municipality is required to use the public right-of-way, the municipality may impose reasonable conditions on its consent which bind the user of the right-of-way. *Id.* §34.36. Thus, municipalities generally have the power to license and regulate cable under their traditional home rule and police powers in the absence of constitutional or statutory provisions specifically limiting such power. It therefore follows that delimiting the geographic boundaries of a franchise area — at issue in this case — should no more be subject to challenge under federal antitrust laws than other legitimate acts of local government restricting business activities, such as reasonable zoning restrictions for commercial and residential construction.

B. Federal Policy, As Expressed By The Federal Communications Commission, Has Consistently Recognized And Underscored The Fundamental Role Of Local Government In Licensing And Regulating Cable Systems.

The Federal Communications Commission ("FCC") consistently has recognized the legitimacy and importance of municipal regulation of cable, even as it has "deregulated" at the federal level. In 1972, following 10 years of evolutionary involvement in cable television regulation, the FCC adopted a comprehensive regulatory plan for cable.[5] *Cable Television Report and*

---

[5] One of the parties commenting in this rulemaking was Community Tele-Communications, Inc., petitioner's corporate affiliate, which "supported a more flexible course whereby the Commission, as suggested in our third alternative, would pre-empt some areas, establish minimum standards for state and local authorities to follow in others, *and leave purely local matters to the appropriate local entity.* " 37 Fed. Reg. 3252, 3275 (1972). (Emphasis added.)

Order, 37 Fed. Reg. 3252 (1972).[6] Faced with the need to clarify appropriate federal, state and local regulatory roles, the FCC established a regulatory structure for cable TV based upon a deliberately-structured dualism, with the federal government exerting preemptive authority in certain areas and state and local governments permitted to regulate in all others. In its 1972 Report, the Commission specifically addressed the appropriate role of local government authorities in the licensing and regulation of what was then recognized as an "emerging technology that promises a communications revolution." 1972 Report at 3277.

> "We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, *local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.*" 1972 Report at 3276. (Emphasis added.)

The Commission established minimum local franchise standards which required that local authorities incorporate certain regulatory provisions in their franchise ordinances covering "the franchise selection process, construction deadlines, duration of the franchise, rates and rate changes, the handling of service complaints and the reasonableness of franchise fees." 1972 Report at 3276. The FCC considered local governments well-suited to determine whether cable system construction should be restricted to a given area and required that franchis-

---

[6] Hereinafter, "1972 Report."

ing authorities provide for timely construction of the system, stating:

> "*Another matter uniquely within the competence of local authorities is the delineation of franchise areas.* We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. . . .While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. *There are a variety of ways to divide up communities; the matter is one for local judgment.*" 1972 Report at 3276. (Emphasis added.)

In its *Clarification of Rules and Notice of Proposed Rulemaking,* 39 Fed. Reg. 14288 (1974), the FCC again identified local franchising authorities as best suited to delineate franchise districts and specifically noted its approval of local decisions to restrict franchisees to discrete sections of the franchise area.

> "It was our intent that all parts of a franchise area that could reasonably be wired would be wired. . . .
>
> Clearly, this problem can best be dealt with at the local level since every community presents unique demographic vagaries. Some over-all guidelines, however should be set out. Obviously, the ideal case is where a franchisee is required to wire the entire franchise area. This is our present rule. The purpose of the rule was to assure that no 'cream-skimming', wiring just the economically lucrative portions of a franchise area, would take place. *We are aware, however, that many franchises are being granted that do not encompass the entire political subdivision of the grantor.* Such grants are

> appropriate so long as they are not used as a device to deprive certain portions of the population of service. *In some cases, cities decide to grant multiple franchises to different franchisees for various discrete sections of the franchise area. This is acceptable so long as the ultimate result is complete coverage of the area.*" 39 Fed. Reg. 14288, 14294 (1974) (Emphasis added.)

Furthermore, while the Commission generally avoided expressing an opinion as to whether the state or municipal level of government was best suited to regulate in particular subject areas, it consistently singled out the issue of delineating franchise areas as a uniquely local task. After reviewing various options, it concluded that such matters present uniquely local problems:

> "We can see reasonable justifications in all of these approaches. *They point up the necessity of local involvement in the cable process to deal with the unique problems presented by various communities.* We think it would be a mistake to attempt to specify a nation wide rule on this point. *Indeed, it might be very difficult to create any such rule even on a state by state level. This is a job for the localities.*" 39 Fed. Reg. 14288, 14294 (1974). (Emphasis added.)

By 1979, the Commission was substantially removed from its deep involvement in cable television regulation. However, as it sought to "deregulate" cable at the federal level, the FCC's clear intent was to leave "maximum flexibility" and responsibility for franchising decisions in the hands of local authorities.

> "The decision to delete certain of our former franchise standards was difficult. In our judgment, the goals that these franchise standards sought to further were — and still are — reasonable, fair, and laudatory. . . . *We now seek to allow these local*

> *authorities maximum flexibility to franchise cable operators in a manner that will best serve the interests of their citizens,* at least as long as the actions taken at the local level will not undermine important and overriding federal interests. Our deletion of these mandatory standards therefore should not be viewed as a retreat on the issues of fair procedures, protection of the cable consumer, and the like, *but as a decision to leave responsibility in these areas where it appears to belong — in the hands of the local authorities who will have the ultimate responsibility for enforcing these provisions."* 44 Fed. Reg. 25245, 25246 (1979). (Emphasis added.)

Thus, federal communications policy has consistently recognized the critical role of local government in regulating cable TV and has underscored the premise that local regulation is legitimate and valid.

C. The Regulatory Issues Raised By Cable TV Are Fundamentally Local In Nature.

The established regulatory framework for cable TV, by placing primary reliance on municipal government, recognizes that the regulatory issues involved are fundamentally local in that their proper resolution requires familiarity with community conditions and needs. The local nature of the issues derives primarily from the basic economics of the industry and the nature of the service itself.

Historically, cable systems have enjoyed a *de facto* monopoly in the area served, even where two companies initially enter the market. Essentially, this is because in most cases the market is insufficient to support more

than one company.[7] This clear tendency towards monopoly status raises difficult policy questions when a community seeks to issue or renegotiate a cable TV franchise. For example, local authorities must determine whether a cable system operator should be able to serve only the most lucrative parts of a community, based strictly on marketplace considerations, or whether the local government can guarantee that service will be afforded throughout the area. If it is economically feasible to have only one cable TV system in a given community, the local government must determine whether reasonable rates can be ensured. To resolve these questions relating to the economic viability of a proposed system requires familiarity with local conditions such as population densities, land use planning and zoning patterns and the needs and interests of the community. These are appropriate matters of local concern which are within the competence of local officials.

In addition to these basic public policy concerns, recent technological advances in cable service have given rise to unique opportunities to enhance community life and provide essential services. The number of channels available for communication has dramatically increased,[8]

---

[7] While there may be a variety of possible explanations for this *de facto* monopoly situation, the fact remains that virtually every municipality in the country with cable service is served by a single cable system in any given geographic area. See note 21, *infra*.

[8] See, *e.g.*, R.L. Smith, *The Birth of a Wired Nation*, CHANNELS OF COMMUNICATIONS, p. 32 (April-May 1981). In its early stages of development, cable systems provided a maximum of 5 to 12 TV channels. However, recent advances in electronic components now permit transmission of more than 50 video channels on a single coaxial cable. It is not unusual today for cable television companies to offer communities multi-cable systems with a capacity of well over 100 television channels and numerous data channels. As a

and two-way communication is now feasible,[9] making possible a wide spectrum of new services. The following sampling of *services now available* suggests the potential impact cable television may have on a local community:

— Computerized burglar and fire alarm protection through which police and fire departments are notified of emergencies and can be given background information concerning the number of occupants of a residence, the ages of children in the household, the name and phone number of the family doctor, etc.;

— Information concerning public transportation, including bus, train and airline timetables;

— Separate "institutional networks," interconnecting schools, hospitals, libraries, police and fire stations and other local institutions which may originate as well as receive training and educational programming, data transmissions and other services on a one-way or two-way basis;

---

result, cable TV can provide not only a wide variety of entertainment programming, but also a vast array of other telecommunications services.

[9] See, *e.g.*, CABLEVISION (June 22, 1981). As a result of the development of "interactive" or two-way communication, cable systems can now permit communication not only from the cable company to the consumer, but also "upstream" data or video communication from the consumer or an institution back to the cable TV company, or to other users of the system. As long ago as 1972, the FCC foresaw that cable service had the potential to provide, among other services, "special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; and various educational and training programs . . ." 37 Fed. Reg. 3252 n.10(1972).

— Provision of health care information;

— Special services for the blind, the hearing impaired and those with learning disabilities;

— Educational programming produced locally or obtained from a variety of program sources;

— Calendars of recreational events and local park information;

— A method by which subscribers' televisions can be turned on and emergency weather or civil defense alerts can be transmitted to override all programming.

As the list above indicates, cable systems are no longer limited to offering entertainment programming. Cable service now has the potential to affect almost every aspect of community life.[10] Moreover, many of the services offered have traditionally been primary functions of municipal government. The manner in which these services are provided is clearly a legitimate subject for local concern.

II A. RULING FOR THE PETITIONER WOULD EFFECTIVELY ELIMINATE THE ESTABLISHED PATTERN OF MUNICIPAL REGULATION OF CABLE TELEVISION.

A. The Positions Of The Petitioner And The *Amici* States Would Subject Several Thousand Municipalities To Antitrust Scrutiny.

Petitioner and the *amici* states assert that in order to enjoy immunity from antitrust litigation,[11] a municipal

[10] See R.L. Smith, *supra*, n.8.

[11] Of course, the issue is not total immunity from litigation but whether that litigation can be disposed of summarily. See Section II.C. *infra*.

government which seeks to regulate cable TV in the local public interest must be not only authorized to do so by specific state legislation, but that the state must clearly express a policy to displace competition with regulation or monopoly public service in that area of activity.[12]

It is CTIC's position that a grant of constitutional or statutory power over local matters, sufficient under state law to confer municipal authority to license cable systems, is also sufficient to immunize local governments from antitrust litigation challenging the exercise of that governmental power. The authority to regulate inherently includes the power to limit competition by restricting business activities in a manner which serves the public interest. If regulatory power is delegated to local government by state constitution or statute, the federal antitrust laws should not require the states to enact narrow legislation in a particular subject matter for the express purpose of reiterating that inherent power to limit competition. If the state is dissatisfied with the manner in which the local authority is exercised, either because of its anticompetitive effects or for any other reason, it can specifically revoke its grant of authority or seek to preempt regulatory control of the subject matter. *The fundamental point is that, by conferring the power to govern and to regulate in local matters, the state has conferred on local government the power to make the*

---

[12] Petitioner's Brief at 35; *Amici* States' Brief at 21. The petitioner and the *amici* states place principal reliance on their interpretation of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The *amici* states go further by suggesting that each state must actively supervise an expressed policy to displace competition. *Amici* States' Brief at 21.

legislative judgment as to which, if any, anticompetitive restrictions are in the public interest. To suggest otherwise is to confuse the *form* of the delegation of power with the *substance* of the power conferred.

The standards espoused by petitioner and *amici* states would open to antitrust challenge innumerable municipal governmental acts which are clearly anticompetitive but which constitute reasonable restrictions on business activity.[13] Furthermore, in the context of municipal authority over cable TV, such a standard would open to antitrust scrutiny the acts of local government in, at minimum, all of the states in which no cable TV legislation has been enacted and in which municipalities act on the basis of general grants of local governmental powers. Moreover, even in the 15 states in which municipalities have been granted specific authority to license cable systems, it is probable that the standard proposed would not be met, since the statutes do not explicitly articulate a state policy to displace competition. In addition, many state statutes would be subject to challenge on the ground that they do not provide any mechanism for active supervision by the state, as the *amici* states would require.[14] In short, the standard espoused by petitioner and the *amici* states would probably subject municipal regulation of cable TV in 39 states to antitrust scrutiny.

---

[13] See Respondent's Brief, Section II.A.

[14] *Amici* States' Brief at 21. The states rely principally on *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

B. Typical Forms Of Municipal Cable TV Regulation May Have Anticompetitive Effect, But Serve Legitimate Public Interests.

The regulatory policies of local governments, which are expressed through franchising decisions and regulatory restrictions, serve important public interests. Yet, because these governmental acts may have anticompetitive effects, they would clearly be vulnerable to antitrust attack if the Tenth Circuit's decision is reversed. For example, one common regulatory decision is to award a single, nonexclusive franchise and require the franchisee to provide service throughout the franchise area. Such provisions usually involve a commitment by the franchisee to construct the system in accordance with a schedule and to serve all areas of the community determined to have sufficient density of population for cable service to be economically viable.[15] Granting a "nonexclusive" franchise gives the local government the option to grant another franchise if it would result in better service, or at such time as economics permit head-to-head competition.[16] Such franchise provisions are typical where cable systems are in operation. Attached to this Brief as Appendix C is a representative sample of municipal ordinances which do so.

Granting a single franchise and requiring service to the entire franchise area can serve the public interest and the interest of the cable television industry in several ways. First, it recognizes that cable service cannot simply be left to the marketplace and the cable operator's discretion, if discriminatory service patterns are to be

---

[15] Cable systems generally need not serve sparsely populated areas, but they may not "cream skim" by serving only the wealthy or most densely populated portions of a community.

[16] See note 21, *infra*.

avoided.[17] Second, by granting a single franchise, municipalities recognize that, by its very nature, cable television is a capital-intensive industry with high fixed costs.[18] As is true of utilities, the economies of scale mean that an increase in the number of subscribers lowers the average capital cost per subscriber.[19] If two cable companies were to lay their wires and compete for subscribers in the same geographic area, both companies would incur similar initial fixed costs. As a result, the average capital cost per subscriber (which implicity affects subscriber rates) would be approximately doubled. By granting a single franchise, usually after competitive bidding, a municipality can accomodate the need to minimize the average fixed cost per subscriber. In addition, the franchisee is reasonably assured of a stable market upon which long-range financial planning can be based. This enables the operator to provide higher quality commercial services at reasonable rates as well as a wider variety of community services than might otherwise be possible. In short, granting a single, nonexclusive franchise can permit the community to ensure that high

---

[17] The Federal Communications Commission and state agencies which regulate cable have sought to ensure that nondiscriminatory service will be provided subject to reasonable economic limitations due to sparsity of population.

[18] Providing service requires a heavy initial investment in highly specialized electronic equipment and heavy installation costs for placing cable on utility poles or under the public streets. For example, it is estimated that in one urban area (Brooklyn, N.Y.) the average cost of installing one mile of cable will be $99,050, and the service area requires installation of 1,580 miles of cable. Paul Kagan Associates, Inc., Cable TV Regulation, p. 3 (March 27, 1981).

[19] The cost of connecting an individual subscriber is relatively small in comparison to the expenses for equipment and installation of the trunk cables and distribution system.

quality communications services will be made available to all sectors of the community at reasonable rates.[20]

At the same time these regulatory techniques pose obvious problems under an antitrust analysis. When only one franchise is granted, even if it is a "nonexclusive" franchise, potential competitors may be excluded from the market by agreement between the local government and the franchisee. In addition, requiring service to an entire franchise area excludes from the marketplace those cable companies unwilling to provide such service. Thus, the potential anticompetitive effect is clear.

Another common form of restriction is local rate regulation, which typically establishes a maximum charge or schedule of charges for different levels of service. Numerous municipalities in this country have ordinances which impose such restrictions, in part because from 1972 until 1976 FCC regulations required that local ordinances incorporate provisions for rate regulations. 47 C.F.R. § 76.31 (a)(4) (*promulgated* 37 Fed. Reg. 3252, 3281 (1972); *deleted* 41 Fed. Reg. 34963, 34968 (1976)). Rate regulation may serve important public interests. In point of fact, the subscribers to 99% of the systems in the country are served by only one cable system.[21]

[20] Historically, even where more than one franchise has been awarded, only one cable system ultimately remains in the market and provides service. See note 21, *infra*.

[21] Pilnick, March 5, 1980, Tr. 38-39, 42-44, 129, 132, 151; Sample, March 4, 1980, Tr. 218; Westdyke Dep. 38-39. Usually the number of subscribers is insufficient to support two systems. (Pilnick, March 5, 1980 Tr. at 37, 40, 44-46, 54-55). In addition there are physical problems involved, including the cost of rearranging lines on utility poles or the expense of underground installation. (Id. at 33-37, 41; Sample, March 4, 1980, Tr. at 226; Olson, March 6, 1980, Tr. at 58-63) (Testimony at the preliminary injunction hearing is cited by the name of the witness, the date and the page number of the transcript. Deposition testimony is cited by the witness name and page number of the transcript.)

Regardless of the reasons for this state of affairs, there is little choice for the individual consumer desiring cable service. He must either pay the rate charged by the cable company serving his area or do without the service. Under these circumstances, local authorities should be able to make the policy determination as to the need for rate regulation.[22] The FCC has long recognized the appropriateness of municipal rate regulation in order to protect the consuming public.[23] Clearly, however, rate regulation is anticompetitive. Absent immunity, it would appear to be a *per se* antitrust violation for a municipality to enter into an agreement with a cable TV operator that establishes a fixed price for services to be provided to the public. In sum, fundamental local government policy decisions, which include rate regulation, granting of a single franchise and requiring community-wide service, are subject to serious challenge under the antitrust laws unless the many municipalities which impose such restrictions enjoy governmental immunity.

C. A Denial Of Broad Municipal Immunity Will, In Practical Terms, Eliminate Municipal Regulation Of Cable TV In Thousands Of Municipalities.

Unless municipal regulations and contractual restrictions are immune from antitrust attack, they will be subject to scrutiny under both a "*per se* violation" analysis

---

[22] The desirability of rate regulation does not depend upon the existence of "natural" or "*de facto*" monopoly. Local governments regulate many areas of commercial activity and fix rates even where competition exists, where the service involved is a basic service affected with the public interest. For example, taxicabs and privately owned bus companies are in competition but nonetheless are subject to rate regulation. The functions which cable TV can perform, it can reasonably be argued, are equally affected with the public interest.

[23] *E.g.*, 1972 Report at 3276.

and the Rule of Reason. *See Standard Oil Company* v. *United States,* 221 U.S. 1 (1911). Under the Rule of Reason, each factual situation and regulatory mechanism will require separate evaluation. Under this particularized analysis, granting a single franchise, for example, might be upheld in a particular community context, while a similar scheme might be held invalid in a different factual setting.[24] As a result, the validity of municipal regulations will not be subject to any general principles, but will require extensive case-by-case litigation.

Absent broad municipal immunity, local governments will not be able to run the financial risk of extended litigation and possible liability for treble damages. Indeed, as a practical matter, the ultimate question of liability is immaterial. Without immunity, virtually any cable company can threaten a local government with the prodigious expense involved in merely defending such litigation.[25] The substantial expense incurred by the City of Boulder in defending this case, which is a matter of public record, is not likely to go unheeded by local government officials.

If the standard for municipal antitrust immunity is drawn upon narrow lines which may require case-by-case

[24] In addition, although it is unclear how the Rule of Reason would be applied to a local government, arguably it would require balancing the degree of anticompetitive restrictiveness against the procompetitive effects. This would tend to increase the *ad hoc* nature of decisions in the area.

[25] It is significant that the industry involved, and therefore the class of potential plaintiffs, includes affiliates of major national corporations. See Cablefile/81 (Titsch Publishing, 1981). TCI, the corporate parent of petitioner, is the third largest cable TV operator in the country, with 900,000 subscribers and annual revenues of $55.5 million. Sparkman, March 4, 1980, Tr. 112-13.

evaluation, then municipalities may well be faced with an avalanche of antitrust suits.[26] Absent immunity, each of the municipalities listed in Appendix C, along with numerous other local governments, are likely to be subjected to antitrust litigation.[27] Under such circumstances, no prudent local official would attempt to impose any significant regulations on cable TV. Thus, the existing scheme of municipal regulation of cable television will effectively be destroyed.

Realistically, if there is no *local* regulation, cable TV generally will be unregulated, since the federal government has withdrawn in deference to local discretion, and only a handful of states have acted in the area. As a result, no level of government will be addressing the vital questions of public policy raised by rapidly changing cable television technology and services. Service to the community will be assessed in terms of profitability alone; potentially lucrative areas of a community will be served while other areas are ignored. If a *de facto* monopoly is established, municipalities will have no way to guarantee reliable service at reasonable rates. Consequently, communities throughout the country will be denied the opportunity to ensure that cable communications service is provided in a manner which is consistent with legitimate local concerns.

---

[26] Since thousands of municipalities in at least 39 states are potential defendants in the area of cable television alone, this raises a serious question about the capacity of the federal judicial calendar to handle such a volume of complex litigation.

[27] This is not mere speculation. On June 1, 1981, an action was filed by a cable company against two municipalities in Northern California claiming $60,000,000 in antitrust damages. *Televents, Inc.* v. *Martinez,* No. C 81 2376 TEH (N.D. Cal., filed June 12, 1981). See also *TCI Cablevision Inc.* v. *Jefferson City,* No. 81 4054 CV C W (W.D. Mo., filed March 18, 1981).

CONCLUSION

Local government has traditionally played a fundamental role in licensing and regulating cable television service. It is municipal authorities who must resolve important public policy questions which are uniquely local in nature. To deal effectively with the changing and rapidly growing cable television industry, local governments must be free to act without the constant threat of extended antitrust litigation and potential liability for treble damages.

For the reasons set forth herein, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

BINGHAM KENNEDY
Counsel of Record

TRILLING & KENNEDY
1100 Seventeenth Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 223-1577

HOWARD J. GAN
General Counsel

Cable Television
Information Center
2100 M Street, N.W.
Washington, D.C. 20037
(202) 872-8888

Counsel for Cable Television Information Center

June 26, 1981

APPENDIX

APPENDIX A

STATE LAWS WHICH PROVIDE FOR CABLE TELEVISION REGULATION PRIMARILY BY STATE AGENCY

Alaska: ALASKA STAT. §42.05(1976).

Connecticut: CONN. GEN. STAT. ANN. §§16-330 through 16-333 (WestSupp. 1981).

*Delaware: DEL. CODE ANN. tit.26(1974).

Hawaii: HAWAII REV. STAT. §440(G)(1976).

Massachusetts: MASS. GEN. LAWS ANN. ch.166A (1979).

Minnesota: MINN. STAT. ANN. §238(WestSupp.1981).

Nevada: NEV. REV. STAT. §711(1980).

New Jersey: N.J. STAT. ANN. §48-5A(WestSupp. 1980).

New York: N.Y. EXEC. LAW. art.28, §811 *et seq.* (McKinney Supp. 1973).

Rhode Island: R.I. GEN. LAWS. ANN. tit.39, §19(1977 Reenactment).

Vermont: VT. STAT. ANN. tit.30, §§501-507(Supp. 1980).

*Delaware provides for state regulation of cable TV in some of its political subdivisions and permits the remaining political subdivisions to regulate it on the basis of traditional broad grants of regulatory authority.

Some of the information in Appendices A and B is derived from Federal Communications Commission, Cable Television State Regulation (June, 1981).

APPENDIX B

STATE LAWS WHICH SPECIFICALLY PROVIDE FOR CABLE TELEVISION REGULATION BY MUNICIPALITIES*

Arizona: ARIZ. REV. STAT. ANN. §§9-505 through 9-508(West1977).

California: CAL. GOV'T. CODE §53066 (1974) (Deering).

Illinois: ILL. REV. STAT. ch.24 §11-42-11 and ch.34 §429.24(WestSupp.1980).

Indiana: IND. CODE §18-1-1.5-13(b),525-36-1(1976).

Iowa: IOWA CODE. ANN. §364.2(West1976).

Kansas: KAN. STAT. ANN. §12-2006, *et seq.*(1975).

Maine: ME. REV. STAT. ANN. tit.30, §§2151(2)(H)(I), 1901(1-B)(1-C)(West1964).

Nebraska: NEB. REV. STAT. §§18-2201 through 2205, §§23-383 through 388(1977 Reissue).

New Hampshire: N.H. REV. STAT. ANN. §53-C:1 through §53-C:5(Supp.1979).

North Carolina: N.C. GEN. STAT. §§160A-319, 311(1976).

South Carolina: S.C. CODE ANN. §58-12-10 *et seq.* (Supp.1980).

South Dakota: S.D. COMP. LAWS ANN. §§9-35-16 through 9-35-23(Supp.1980).

Tennessee: TENN. CODE. ANN. §7-59-101 *et seq.* (1980).

Virginia: VA. CODE. ANN. §§15.1-23.1(1973 Replacement).

West Virginia: W.VA. CODE ANN. §8-31-1,2(1976).

*Alabama has a unique system for regulation of cable TV which does not fit into any of the categories used here. There is specific state legislation, but it involves local bills for each political subdivision seeking to license and regulate cable TV on an individual basis. *E.g.* 1971 Ala. Acts No. 178 regarding Uniontown, Alabama.

APPENDIX C

SAMPLE OF MUNICIPALITIES WHICH HAVE A SINGLE FRANCHISEE AND REQUIRE SERVICE THROUGHOUT THE FRANCHISE AREA UNDER BROAD GRANTS OF AUTHORITY*

APACHE, OKLAHOMA, Ordinance 193 (November 10, 1980).

ATLANTA, GEORGIA, Ordinance 49-77 (1980).

BELOIT, WISCONSIN, City Code ch. 28.

CINCINNATI, OHIO, Ordinance 62 (1981).

CLEARWATER, FLORIDA, Ordinance 2085,2086.

CREVE COEUR, MISSOURI, Ordinance 953.

DALLAS, TEXAS, Ordinance 16738 (November 5, 1980).

HEATH, OHIO, Ordinance 49-77.

JEFFERSON, OREGON, Ordinance 442.

MURRAY, UTAH, Ordinance 698.

NEW ORLEANS, LOUISIANA, Ordinance 7474.

OCEAN CITY, MARYLAND, Ordinance A11001 (1975).

STEAMBOAT SPRINGS, COLORADO, Ordinance 740.

* This brief list is representative of the vast majority of communities in the country which have adopted such franchise provisions.